Lion Uniform, Janesville Apparel Division *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO. Cases 10-CA-12938, 10-CA-13089, and 10-CA-13284-2

January 21, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 5, 1981, Administrative Law Judge J. Pargen Robertson issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed cross-exceptions and a brief in support thereof and in opposition to the General Counsel's and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lion Uniform, Janesville Apparel Division, Lake City, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The General Counsel in effect has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We do note, however, that Respondent sold its Lake City, Tennessee, facility in September 1979 not in September 1978 as noted by the Administrative Law Judge.

[2] In affirming the Administrative Law Judge's conclusion that the strike in this proceeding has not been shown to have been an unfair labor practice strike, we do not rely on his comments that certain prior unlawful conduct of Respondent had been cured at the time the strike began by a then-outstanding settlement agreement. Rather, we agree that any unfair labor practices that were found were not sufficiently shown to have motivated the strike.

We further find it unnecessary to pass on Respondent's contention that the Administrative Law Judge was barred from considering the legality of its January 5, 1978, decision not to return its fire coat work to its Lake City, Tennessee, plant since we agree in any event with the Administrative Law Judge's conclusion that this action did not violate Sec. 8(a)(5) of the Act.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on September 8, 9, 10, and 11, and October 14 and 15, 1980, in Clinton, Tennessee. The charge in Case 10-CA-12938 was filed on July 19, 1977, and was amended on August 3 and 17, 1977. The charge in Case 10-CA-13089 was filed on September 19, 1977. The charge in Case 10-CA-13284-2 was filed on November 30, 1977, and amended on January 30, 1978. An order consolidating cases, complaint, and notice of hearing issued in Cases 10-CA-12938 and 10-CA-13089 on November 17, 1977. Subsequently, on February 9, 1978, a complaint issued in Case 10-CA-13284-2 along with an order consolidating cases and notice of hearing as to all three of the above-mentioned cases.[1] Pursuant to those complaints, a hearing was held before Administrative Law Judge Michael O. Miller on May 15 and 16, 1978, in Clinton, Tennessee. On June 8, 1978, Administrative Law Judge Miller issued a Decision and Order approving a settlement agreement. The General Counsel took exception to Administrative Law Judge Miller's Decision. On February 11, 1980, the National Labor Relations Board issued an order reversing the Administrative Law Judge and remanding this matter to the Regional Director. On May 8, 1980, the Regional Director issued a notice of hearing pursuant to which this matter was heard.

Upon the entire record,[2] my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Charging Party, and Respondent, I hereby make the following findings:

A. *Background*[3]

During the spring and summer of 1977 Respondent's employees[4] engaged in a union organizational campaign.

[1] Although the three captioned cases were consolidated on February 9, 1978, the Regional Director elected not to consolidate the complaints. That procedure necessitates action which unnecessarily complicates isolation of litigable issues. It is necessary to review each separate complaint and answer in order to completely isolate and consider the issues. Such a process appears to violate the spirit and, perhaps, the letter of Rule 8(e) and (f) of the Federal Rules of Civil Procedure.

[2] In accord with discussions during the hearing herein, I have based my findings of fact on both the record developed in the hearing before me and the exhibits received by both Administrative Law Judge Miller and me.

[3] Respondent admitted the commerce allegations in the complaint. On the basis of that admission, I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent also admitted, and I find, that the Charging Party (Union) is and has been at all times material herein a labor organization within the meaning of Sec. 2(5) of the Act.

In the absence of opposition to Respondent's motion to correct the transcript, that motion is hereby granted.

[4] During the hearing, the parties stipulated, and I find, that the below-described unit constitutes an appropriate bargaining unit and is the unit for which the Union was ultimately certified as bargaining representative:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Lake City, Tennessee plant, including the leadman and plant clerical employees, but excluding office clerical employees and professional employees, guards and supervisors as defined in the Act.

On July 14, 1977, the Regional Office conducted an election to determine if Respondent's unit employees desired to be represented by the Union. The Union prevailed in that election and was certified by the Regional Director as bargaining unit representative on August 26, 1977. On October 6, 1977, that certification was sustained by action of the Board.

The complaint alleges and Respondent admits that it engaged in numerous actions in violation of Section 8(a)(1) of the Act during its employees' union organizing campaign. However, Respondent denies allegations that it engaged in other 8(a)(1) violations as well as 8(a)(3) and (5) allegations which allegedly occurred at various times after the election.

On October 12, 1977, the unit employees struck Respondent's Lake City, Tennessee, facility. The General Counsel alleges that that strike was caused and prolonged by Respondent's unfair labor practices and is therefore an unfair labor practice strike.

At the time of its employees' strike, Respondent's production at its Lake City facility was limited to the production of firemen's clothing.[5] On October 24, 1977, Respondent removed its firemen's clothing production from its Lake City facility to a facility it owned in Beattyville, Kentucky. The General Counsel alleges that by moving its facility from Lake City without first negotiating with the Union, Respondent violated both Section 8(a)(3) and (5) of the Act.

By telegram dated October 23, 1977, Respondent advised the Union that its removal of fire coat production from Lake City was temporary. However, the Union received another telegram from an agent of Respondent indicating that the removal of the firemen's clothing production line was necessitated by the need to expand Respondent's facilities.

During October 1977 the parties began collective-bargaining negotiations. Negotiation sessions were held on October 25, November 1, 2, and 28, December 15 and 16, 1977, and on January 4, 5, 6, 23, and 24, March 21, May 24, and September 14, 1978.

By letter dated January 5, 1978, Respondent advised the Union that it had tentatively decided to leave the firemen's clothing production line at Beattyville. However, Respondent advised the Union that jobs would be available at Lake City for employees who desired to end the strike.

On May 16, 1978, the Union advised Respondent that it was ending the strike and offering, on behalf of unit employees, to return to work unconditionally.

Between May 31 and June 20, 1978, all striking employees were offered reinstatement by Respondent at its Lake City facility.

On September 28, 1978, Respondent sold its Lake City facility to FMK. The General Counsel did not contend that Respondent engaged in illegal activity by selling the Lake City facility.

By letter dated August 29, 1980, Respondent offered all employees engaged in the strike during October 12, 1977, through May 16, 1978, the opportunity to move to Beattyville with moving expenses, to make fire coats.

[5] Firemen's clothing includes several items which make up firemen's coats and trousers. On occasion "firemen's clothing" is referred to as "fire coats."

B. *Findings*

1. The preelection 8(a)(1) violations

The complaint in Cases 10-CA-12938 and 10-CA-13089 alleged, and Respondent admitted, the matters set forth below.[6] On the basis of the allegations and admissions, I find that the following activity occurred as alleged and that all the following constitute separate 8(a)(1) violations:[7]

(a) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, interrogated its employees concerning their union membership, activities, and desires: Plant Manager Ray Roaden, May 23, June 10, 17, and July 7, 12, and 13, 1977; and Supervisor Faye McGee, May 27 and June 23, 1977.

(b) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, threatened employees that selection of the Union as their collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union at its plant, and that the Union could not solve the employees' problems: Owner Clarence Lapedes, May 5 and June 1, 1977; Vice President Sydney Burns, July 7, 1977; and Plant Manager Ray Roaden, May 18, 23, 25, June 6, and July 12, 1977.

(c) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, threatened its employees with discharge if they joined, or engaged in activities on behalf of, the Union: Plant Manager Ray Roaden, July 13, 1977; Supervisor Faye McGee, July 13, 1977; and Employee Lena Miles, May 27, 1977.

(d) Respondent, by its following-named officers, supervisors, and agents, on or about the dates following their respective names, in and about the vicinity of its plant, threatened its employees that Respondent would close its plant if the employees selected the Union as their collective-bargaining representative: Owner Clarence Lapedes, May 5 and June 1, 1977; Plant Manager Ray Roaden, May 18, 25, 27, June 1, and July 11, 12, and 13, 1977; Employee Lena Miles, May 27, 1977; and Supervisor Faye McGee, July 7, 1977.

(e) Respondent, by its following-named supervisors and agents, on or about the dates following their names, in and about the vicinity of its plant, promised its employees employment for themselves and the relatives of its employees if its employees rejected the Union as their

[6] Respondent argued that the Regional Director erred by setting aside a prior settlement agreement on November 14, 1977. The settlement agreement was approved on August 28, 1977. In view of my findings herein that Respondent engaged in violative conduct on August 31 and October 12, 1977, I find no basis to rescind the Regional Director's November 14 action.

[7] In that regard, Respondent admitted that as to these proceedings all the persons named in this section were either supervisors and agents or agents at material times.

collective-bargaining representative: Plant Manager Ray Roaden, June 17, 1977; Supervisor Fay McGee, May 30, 1977; and employee Lena Miles, May 27, 1977.

(f) Respondent, by its supervisor and agent, Plant Manager Ray Roaden, on or about July 11, 1977, in and about the vicinity of its plant, solicited its employees to influence other employees to vote against the Union.

(g) Respondent, by its following-named officers' supervisors, and agents, on and about the dates following their respective names, in and about the vicinity of its plant, threatened its employees that Respondent had canceled its plans for plant expansion and installation of air-conditioning in its plant because of their membership in, and activities on behalf of, the Union: Owner Clarence Lapedes, May 5, 1977, and Supervisor Faye McGee, July 14, 1977.

(h) Respondent, by its supervisor and agent, Supervisor Faye McGee, on or about July 7, 1977, in and about the vicinity of its plant, threatened its employees that Respondent would withhold wage increases from its employees because of their activities on behalf of the Union.

(i) Respondent, by its supervisor and agent, Plant Manager Ray Roaden, on or about July 11, 1977, in and about the vicinity of its plant, promised its employees that Respondent would establish a grievance committee if its employees rejected the Union as their collective-bargaining representative.

2. The contested 8(a)(1) allegation

The complaint in Case 10-CA-13284-2 alleged that Respondent's Lake City plant manager, Ray Roaden, threatened employees with discharge if they supported or engaged in activities on behalf of the Union.

Lynda Strong testified that she was employed by Respondent at Lake City on October 12, 1977, when she and other employees went out on strike. As the employees walked out, Strong had a conversation with Plant Manager Roaden. Strong testified that she was asked by Roaden to return to work under the same working conditions. However, Strong testified that none of the employees wanted to go back in and that after the employees refused to go back in, Roaden "told us we were fired. The final thing he said, we were fired."[8]

I find no reason to discredit the testimony of Strong. She impressed me as a candid, straightforward witness. Respondent offered evidence that it was unaware of the whereabouts of former Plant Manager Ray Roaden. Roaden did not testify. Therefore, I credit the testimony of Strong, and find that Roaden told her that the employees were fired upon their refusal to return at the beginning of the strike. I find Roaden's statement was precipitated by Respondent's employees' strike activity and constitutes a threat in violation of Section 8(a)(1) of the Act.[9]

3. The alleged unilateral changes of August 31, 1977

The General Counsel alleged that Respondent's Plant Manager Roaden instituted numerous unilateral changes during an August 31 speech to the employees.

Former employee Doris Swatzell testified that Roaden called a meeting on August 31, 1977, and "he told us you will, he said we weren't to be talking anymore, we were going to cut out going to the restroom, there would be no more being absent one or two days a week, no more being late and that he intended to give warning slips for this." Swatzell went on to testify that prior to the August 31 meeting none of the rules mentioned by Roaden had been in effect nor had they been enforced. On cross-examination Swatzell admitted that she used the bathroom at times when she was not permitted to, but that she did not receive a warning.

Former employee Cleta Long testified about Roaden's speech: "Mr. Roaden said that we had a work stoppage and he said that there was too much talking and too much going to the bathroom, too much walking around pretending to be working when we wasn't and he said that we were going to make fire coats if he had to work us 10 and 12 hours a day, seven days a week, and if he had to he would put on a night shift and we would train them." According to Long, Roaden also told them: "And he said that he had quit making coffee because he wasn't collecting enough money to pay for it and until he decided, we got together and decided, that he would make more coffee and that he was going to be watching us and if he gave out warning slips, if we got three warnings we would be fired. And he said he wasn't going to put up with being late, being absent and that when we missed a day, we had to come into his office and if our excuse was o.k. with him we could go back to work and if it wasn't, we would be fired." Long testified that none of the rules mentioned by Roaden in that speech had been brought to the attention of the employees prior to that day. Long admitted on cross-examination that rules similar to those mentioned by Roaden during the August 31 speech may have been posted in the plant prior to the time of the employees' union activity.

Former employee Lynda Strong also testified concerning Roaden's speech. Strong testified: "Mr. Roaden called us all together and he told us that we would not be allowed to go to the bathroom except, you know, except once in between breaks. He told us we were engaged in a work stoppage, that we would not be able to take vacation when we were supposed to." Strong also testified: "If we were absent, now I remember him saying something about our department being tardy, if we were tardy or absent we had to go into the office and see him before we went out on the floor. . . . He said he was going to start issuing warnings. . . . We were not to place our lunch orders anymore." Strong testified that employees would place lunch orders by calling restaurants outside the plant. On cross-examination Strong admitted that Respondent had posted work rules on the employee bulletin boards prior to the time the employees commenced their union activity.

[8] The General Counsel did not allege that Respondent actually discharged any striking employees.

[9] *Eastern Smelting and Refining Corp.*, 237 NLRB 1312 (1978).

Respondent witness Thelma Wilson, a former employee, testified that Roaden's August 31 speech was precipitated by a slowdown by Respondent's employees. Wilson testified that the employees stayed in the bathroom and that "there was one girl in particular, she always took a nap on the floor." Wilson testified that Roaden, during his August 31 speech, told the employees that the slowdown "had to be stopped because they couldn't put out any work because they were spending to much time in the bathroom and killing too much time." Wilson testified that Roaden did mention rules during that speech, but the rules he referred to were the same rules which had been posted in the plant prior to the commencement of union activities.

Respondent also called former Supervisor Faye McGee. McGee also testified that there was a slowdown among the employees during August 1977. She testified that "the girls were staying in the bathroom too much and they were just wasting too much time and not putting out enough work." McGee testified that there was a bad "decrease in production." McGee testified that Roaden's address to the employees was because of the slowdown. McGee identified Respondent's rules which were, according to her, posted prior to the employees' union activity. She testified that those rules were in force and were enforced before August 31, 1977.

No evidence was offered to rebut the testimony of Wilson and McGee that some of the employees engaged in a slowdown in production during August 1977. However, there was also no evidence which rebutted testimony of Swatzell, Long, and Strong evidencing that Roaden's remarks demonstrated an intent to engage in stricter enforcement of work rules. Additionally, there was no rebuttal of testimony that certain aspects of Roaden's remarks transcended the established rules. In that regard, it is unrebutted that Roaden announced that Respondent would no longer make coffee for the employees and that employees would not be permitted to continue placing lunch orders from outside restaurants.

Those items are the type which the Board has traditionally found to impact employee working conditions and, therefore, constitute mandatory subjects of collective bargaining.[10] The alleged slowdown had apparently gone on for a couple of weeks at the time of Roaden's speech. There was no showing that emergency action was required or that any other circumstances existed which prevented Respondent from taking the time to notify the Union of its problem and contemplated action. Therefore, I find that Respondent informed its employees on August 31 that work rules would be more strictly enforced and that the employee privileges of having coffee and placing lunch orders through outside restaurants were being removed. Respondent took those actions without notifying and bargaining with the Union as the employee's exclusive collective-bargaining representative.[11]

[10] *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716 (1977); *Womac Industries, Inc.*, 238 NLRB 43 (1978).

[11] *Pak-Mor Manufacturing Company*, 241 NLRB 801 (1979); *Fry Foods, Inc.*, 241 NLRB 76 (1979).

4. The October 24 transfer of the firemen's clothing line to Beattyville, Kentucky

The complaint alleged that Respondent violated Section 8(a)(3) and (5) by unilaterally moving its firemen's clothing product line from Lake City to Beattyville on October 24 and thereby abolishing the jobs of various employees.

The evidence in regard to Respondent's move is not in conflict. Respondent offered evidence that it purchased a facility in Beattyville, Kentucky, shortly before the July 14, 1977, election. However, that purchase flowed from management action which started several years before the actual purchase. The evidence, which was not rebutted, was convincing that Respondent was engaged in plans to purchase a facility which would ultimately house the firemen's clothing production, before its Lake City employees started their union campaign.

Although Respondent was also considering the option of expanding its Lake City facility, the unrebutted evidence demonstrated that that option would have involved substantial costs. That cost would have been reflected both in the cost of constructing an additional facility at Lake City and the cost of financing that construction.[12] The evidence demonstrated that there were no existing facilities at Lake City which were available for Respondent's expansion.

When the Lake City employees struck on October 12, Respondent had not commenced any operations in Beattyville. The evidence reflected that because of the strike, Respondent was unable to continue production in Lake City. Therefore, on October 24 Respondent started to move its machinery and work in process to Beattyville.

At the time of its move, and for the prior 2 years, Respondent's only production in Lake City involved firemen's clothing. Following its October 24 move, Respondent resumed firemen's clothing production in Beattyville.

Respondent did not afford the Union an opportunity to negotiate before the October 24 move. Respondent sent the following telegram on October 23, which was received by the Union on October 24:

> NOTICE IS HERE WITH EXTENDED TO YOU THAT BECAUSE OF THE WORK STOPPAGE AND OUR CRITICAL NEED TO MANUFACTURE FIRECOATS, LION UNIFORM, JANESVILLE APPAREL DIVISION WILL BEGIN MANUFACTURING FIRECOATS ELSEWHERE ON A TEMPORARY BASIS. WE ARE HOPEFUL THIS SENSELESS WORK STOPPAGE WILL END SO THAT LION UNIFORM CAN RESUME OPERATIONS IN LAKE CITY. FURTHER, CONTINUED UNLAWFUL CONDUCT IN THE FACE OF A COURT RESTRAINING ORDER WILL FORCE US TO EXAMINE THE POSSIBILITY OF A SUIT FOR DAMAGES

[12] The evidence reflected that an additional 20,000-square-foot facility at Lake City would cost $334,500. However, the contractor retained to consider Lake City expansion recommended removal of the old facility and construction of a new 40,000-square-foot facility which would cost $600,000. The Beattyville facility which Respondent purchased contained 53,000 square feet and cost Respondent $400,000. The $400,000 was financed at a lower interest rate than any available at Lake City.

AGAINST OCAW. SYDNEY BURNS, VICE PRESIDENT OF MANUFACTURIING. . . .

However, confusion resulted from a second telegram sent to the Union on October 24. Richard DuRose admitted that his telegram, which was sent at a time when he was unaware of Sydney Burns' telegram, resulted in possibly misleading the Union. His wire read:

THIS IS TO INFORM YOU THAT LION UNIFORM IS TRANSFERRING ITS JANESVILLE MFG FROM ITS LAKE CITY, TENNESSEE PLANT TO OTHER PLANTS BECAUSE OF THE INCREASE IN BUSINESS IN THAT LINE OF GOODS AND THE LACK OF ROOM TO EXPAND. WE WILL BE TRANSFERRING OTHER WORK TO LAKE CITY IN THE FUTURE TO CONTINUE EMPLOYMENT FOR ANY WHO SO DESIRE. RICHARD A. DUROSE, ATTORNEY FOR LION UNIFORM.

Nevertheless, unrebutted evidence indicates on several occasions between October 24, 1977, and January 5, 1978, Respondent advised the Union that its October 24 move was temporary. John Williams, the Union's district director, admitted that Respondent "had told us consistently that they were going to return the firecoats back to Lake City." Respondent's attorney, DuRose, testified:

> Mr. Williams made a comment to me that he didn't want to spend a lot of time negotiating this contract because the company didn't have any jobs for the people and I said no, I didn't know how he got that idea but said that what happened was that the company—he was referring to the fact that the machinery had moved out of the Lake City plant—I told him that that was only because the company had some customers that were in urgent need of these fire coats they made at the plant and I explained to him that the company originally, when the strike first started, the company originally thought that they could use supervisors, and as I recall there were a number of employees that didn't join the picket line, that came in to work, and the company originally felt that the supervisory staff and the employees that came in to work, they could fill that order, but, uh, and I told Mr. Williams that it quickly became apparent that we couldn't do that and the reason for that is that the employees were prevented from coming in to work by the pickets.
>
> Mr. Williams indicated that he knew that was so, he either said something—I know at least that he and the committee smiled about that. I think they were proud of the fact that they had been able to keep the employees out.
>
> I said that as soon as the strike was ended, that we would bring the equipment back and we would open up the plant again.

Unrebutted evidence also demonstrated that the October 24 move was precipitated by the strike. That evidence proved that the move was not planned until around October 21. Respondent's former warehouse manager at another of its plants, Don Meadows, testified that he assisted in the move from Lake City to Beattyville. According to Meadows' testimony, the move was disorganized, unplanned, and chaotic. Meadows testified that he was prevented from moving everything by Respondent's vice president, Sydney Burns, who told him that they would be moving back to Lake City.

The record provided no basis on which I could find Respondent violated Section 8(a)(3) or (5) by its October 24 move. The evidence clearly reflected that Respondent was prevented from continuing production by its employees' strike. The evidence also demonstrated that as to the firemen's clothing production, time was of the essence. According to unrebutted testimony, and documentary evidence, Respondent had fallen behind on its fire coat production schedule and was receiving customer complaints about its delay in supplying those garments. Those facts clearly support Respondent's contention that it faced serious customer losses if it permitted the strike to stop production. Therefore, I find that Respondent proved that the move was temporary and was necessitated by business reasons brought on by its employees' strike.[13]

There was no evidence offered demonstrating that Respondent's move to Beattyville transcended the "reasonable measures necessary in order to maintain operations in such circumstances." *Empire Terminal Warehouse Company*, 151 NLRB 1359 (1965). Despite Respondent's apparent union animus as evidenced by its illegal anti-union campaign, the record shows that Respondent engaged in good-faith negotiations with the Union beginning in October 1977. Moreover, when the strike ended, Respondent reinstated the striking employees and announced to its employees that it denounced actions which did not fully respect the employees' rights to associate with the Union. Furthermore, following its move, Respondent continuously took the position in its discussions with the Union that it would provide work for the employees at Lake City.

I find that this case falls within the scope of the rule announced in *Empire Terminal Warehouse Company, supra*, which held that similar conduct by an employer does not constitute violative action.[14]

In reaching this conclusion I am bothered by evidence which tends to show that Respondent was motivated by its employees' union activities. In May 1977, Respondent's owner threatened employees that it would close the plant and cancel expansion plans because of the union activities. Those threats would have been persuasive if Respondent had either closed the plant or canceled expansion activity without the intervention of other motivating events. However, the evidence failed to show that Respondent either closed the plant or canceled actual expansion activity. Although expansion was considered, Respondent never undertook such activity and its studies showed Lake City expansion would have been unduly expensive. Moreover, Respondent's alleged illegal activi-

[13] See *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980).

[14] The *Empire Terminal Warehouse Company* case involved temporarily subcontracting work rather than temporarily relocating work. However, in other respects the issues are similar. See also *W. R. Grace & Co., Construction Products Division*, 230 NLRB 617 (1977); *General Electric Company*, 240 NLRB 703 (1979).

ty came at a time when any other action or inaction could have endangered its continued viability.

5. The January 5, 1978, letter

The General Counsel also alleged that Respondent violated Section 8(a)(5) by moving the firemen's clothing product line from Lake City to Beattyville, Kentucky, on January 5, 1978.[15] In support of its position, the General Counsel cited *Townhouse T.V. & Appliances*, 213 NLRB 716 (1974). I find the facts here are not similar to those in *Townhouse*.

On January 5, 1978, Respondent delivered the following letter to the Union:

> In order to save its fire coat and other Lake city business during your strike, the Company moved the production elsewhere. The move presented many difficulties and cause a considerable interruption in the supply of garments to its customers.
>
> Production of fire coats, etc., is now proceeding, although demand is making it difficult to meet schedules.
>
> The Company has tentatively concluded that it cannot run the business risks of attempting to relocate the fire coat and other Lake City production back in Lake City again. This tentative conclusion is based purely on very serious business problems—the interruption which would occur if machinery and materials had to be relocated, the risk of loss in transit, the risk of higher production costs in reassembling and possibly retraining a work force in Lake City, and the further delays in shipment to customers which would occur if anything went wrong in starting up again at Lake City.
>
> We are prepared to discuss any aspect of this matter, including the tentative conclusion itself, in good faith.
>
> The Company does plan to resume production, but of other products, at Lake City, when the strike is over.

The General Counsel contends that the above letter evidences an 8(a)(5) violation. I find that the evidence does not support that allegation.

The Union's director, John Williams, testified that there was no bargaining on Respondent's tentative decision to keep the firemen's clothing at Beattyville. However, other evidence which was unrebutted demonstrates that the Union was offered the opportunity to negotiate on Respondent's tentative decision.

The January 5 letter (above) states that Respondent was prepared to discuss its tentative decision to keep the firemen's clothing line in Beattyville. Respondent's vice president, Jan Spornhauer, testified that Respondent's attorney, Dean Denlinger, tried to explain to the Union during the January 5 negotiating session why Respondent felt it could not return the fire coats to Lake City,[16] but that John Williams said he "didn't want to listen to [Respondent's] reasons and that he wanted the fire coats back at Lake City as a matter of principle." Spornhauer went on to testify that "Sydney Burns said that Lion was 120 days behind schedule, and that the return of fire coats production back to Lake City would cause an economic hardship to Lion Uniform."

During the hearing Respondent offered substantial evidence in support of its tentative decision to keep the firemen's clothing production in Beattyville. That evidence demonstrated that a consulting firm advised Respondent in 1973 that the Lake City facility was too small to continue as a facility for the manufacture of fire coats. When Respondent purchased the Beattyville facility in July 1977, it anticipated that eventually all its fire coat production would be at Beattyville. The Beattyville facility is substantially larger than the facility at Lake City—53,000 square feet versus 16,000 square feet.

Although, according to Respondent, the October 1977 strike required a premature transfer of fire coats to Beattyville, that transfer was temporary. However, as time passed the operation at Beattyville became more and more efficient until it reached the point in January 1978 where it became apparent from an economic standpoint, that it would be more disadvantageous to move back to Lake City than to stay in Beattyville.

In that regard, Respondent offered unrebutted testimony proving that the move back to Beattyville would involve substantial costs. In order to maintain fire coat production at the level maintained at Beattyville during January, Respondent would have to expand its Lake City facility. The cost of such an expansion, plus the cost associated with another move and delay associated with retraining personnel because of innovations in the manufacturing process since the strike started, would be considerable.

Furthermore, according to Respondent, a return to Lake City would again aggravate the delay of supplying fire coats to customers with a probable result that other customers would be lost.

The evidence demonstrating that the manufacture of fire coats required a great deal of floor space and that Lake City was too small to continue to serve as the exclusive facility for fire coat production was persuasive. Furthermore, no effort was made to rebut that evidence other than to show that Lake City had served as the exclusive fire coat facility before the strike. I find that fact insufficient to overcome the other evidence.

Before the strike Respondent has no facilities larger than Lake City available for fire coat production. Re-

[15] Respondent's only move from Lake City to Beattyville actually occurred around October 24, 1977, as shown above. In the instant allegation the General Counsel is addressing Respondent's decision to keep the fire coats at Beattyville.

[16] The General Counsel argues that Respondent's January 5 letter presented the Union with a *fait accompli*. However, it is important to note that the employees at Lake City were on strike from October 12, 1977, to May 16, 1978. On January 5, 1978, Respondent had no reason to believe that the employees would have returned to work regardless of whether fire coat work was available. Therefore, I find no support for the General Counsel's contention that Respondent's January 5 notice did not afford the Union an opportunity to negotiate before the move to Beattyville became permanent. If the Union had elected to negotiate and those negotiations had been sucessful, there remained more than ample time to return fire coat production to Lake City.

spondent had just purchased the Beattyville facility and, according to its version of corporate planning, the fire coat production was to be transferred to Beattyville in due course.

Therefore, as to the process under which I must consider Respondent's defense, it is apparent that during January conditions had changed substantially from those which existed before the strike. There was the intervention of the purchase of the Beattyville facility. In considering that fact, I am aware that the General Counsel did not allege anything improper in the Beattyville purchase. Moreover, no evidence was offered which reflected upon Respondent's proof that the Beattyville purchase had its genesis long before the commencement of union activity.

Therefore, I must consider that on January 5 Respondent found itself faced with the possibility of removing the fire coats from a facility of sufficient size back into the Lake City plant which was too small.

According to Respondent's evidence, January 1978 presented a dilemma. A move back to Lake City would necessitate either the enlargement of the Lake City facility or splitting the fire coat production between two plants—Lake City and Beattyville.

Respondent offered substantial evidence proving that both the above alternatives would result in severe economic hardship to such an extent that the election of either alternative over retaining the fire coats in Beattyville would endanger the economic viability of Respondent. In that regard, Respondent proved that it considered expanding the Lake City facility during early 1977.[17] Unrebutted testimony demonstrated that Respondent continued to explore expansion possibilities until May 1977, when it discovered that it would be unable to finance expansion costs at an acceptable interest rate.

Therefore, in January 1978 Respondent was faced with the prospect of effectuating a business decision which it had rejected less than a year earlier as being unsound. Moreover, added costs would have been incurred in January, in order to dispose of the Beattyville facility and retrain Lake City employees. Additionally, the move back would result in additional delays in production with the possible loss of more customers.

As to the second alternative, producing fire coats at both Lake City and Beattyville, Respondent demonstrated that option would result in duplication of costs to such an extent that it would constitute an inefficient operation.

None of Respondent's evidence regarding the business bases for its January 5 decision was rebutted.

Therefore, I find that the General Counsel failed to offer substantial evidence in support of its allegation that Respondent violated Section 8(a)(5) by failing to negotiate regarding return of the firecoats to Lake City.[18] The evidence does show that Respondent did in fact offer to negotiate about that decision and, moreover, Respondent amply demonstrated that its tentative decision of January 5 was based upon business reasons rather than reasons which may be violative of the Act.[19]

6. The unfair labor practice strike

The law shows that strikes which are caused or prolonged by the employer's unfair labor practices are unfair labor practice strikes. There appears to be no significant issue here regarding the character of the October 12, 1977, strike since, as I find below, all unit employees were properly reinstated. Nevertheless, the issue was joined. On the basis of the record I am unable to conclude that the strike was caused or prolonged by Respondent's unfair labor practices.

I am aware of Respondent's conduct leading up to the July 14 election. However, in consideration of the employees' motivation in striking, at the time of the strike that particular conduct had been cured by a settlement agreement. The agreement was approved by the Regional Director on August 29, 1977, and the notice to employees had been posted since September 6. Ultimately, the settlement agreement was set aside by the Regional Director but not until November 14, 1977.

At the time of the walkout, Respondent had committed an additional 8(a)(1) and (5) violation by unilaterally announcing stricter enforcement of rules as shown above. As the employees were walking out on October 12, the plant manager threatened employee Lynda Strong that the employees would be discharged. However, there was no evidence demonstrating that Respondent was negligent, dilatory, or otherwise remiss in its obligations to meet and negotiate. In fact the only evidence offered demonstrated that it was the Union, not Respondent, that was unavailable to meet and negotiate during several days before October 25, 1977.

Moreover, there was no evidence offered regarding the motivation behind the Octobr 12 strike. The record contains no reference to employee meetings, conversations, or anything else which would show why they decided to strike. I am fully aware of the situations where motivation may be imputed by the Administrative Law Judge (for example, see *Matlock Truck Body & Trailer Corp., and its Agent Roy L. Matlock*, 217 NLRB 346 (1975)). However, there was insufficient evidence here

[17] See fn. 12, *supra*.

[18] In its decision reversing Administrative Law Judge Miller, the Board found that Respondent must show that a *status quo ante* remedy would endanger its continued viability (247 NLRB 992). However, that is not the test which is applicable to the instant issue. The question here is whether Respondent violated Sec. 8(a)(5) by its January 5 action.

[19] Compare *International Chemical Workers Union, Local No. 112, AFL-CIO, CLC (American Cyanamid Company)*, 235 NLRB 1316, 1322-23 (1978). Unlike the situation in *American Cyanamid*, it appears that Respondent substantially complied with criteria established in *Westinghouse Electric Corporation (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965). The evidence is convincing that Respondent's action of January 5 was motivated solely by economic considerations, and Respondent had in the past transferred fire coat production from one plant to another. As I find below, the permanent transfer to Beattyville had no demonstrable adverse impact on employees in the unit. Moreover, Respondent, by its January 5 letter and subsequently during negotiations, demonstrated a willingness to negotiate over the permanent transfer. The Union did not put it to the test. There were no substantive negotiations on the issue because of union resistance. When Respondent attempted to explain to the Union why it wanted to leave the "fire coats" in Beattyville, the Union expressed disinterest indicating only that it demanded return of the fire coats.

demonstrating that I would be warranted in concluding that unfair labor practices must have played a part in the employees' decision to strike absence some evidence to that point.

I find that the General Counsel failed to sustain its burden of proof by showing either direct evidence that the employees were motivated by Respondent's unfair labor practices or that it was inescapable that those violations contributed to the initiation or prolongation of the strike. "Board law holds that an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices. *Typoservice Corporation*, 203 NLRB 1180 (1973)." *John Cuneo, Inc.*, 253 NLRB 1025, 1026 (1981).

7. Reinstatement of strikers

Although the complaint does not allege any impropriety associated with Respondent's reinstatement of striking employees, evidence was presented in that regard primarily on the issue of whether the removal of the fire coat line constituted a unilateral change in working conditions. I have therefore considered the issue. The parties stipulated that all striking employees were offered reinstatement between May 31 and June 20, 1978. All the relevant evidence demonstrated that those striking employees who accepted reinstatement returned to work under substantially equivalent conditions to those which existed when they struck in October 1977. The only matter which arose as an issue in that regard was the question of whether work other than production of fireman's clothing could constitute substantially equivalent employment. In that regard, unrebutted evidence proved that the work actually performed by those striking employees upon their return: (1) was subjected to fewer layoffs and irregularity than work performed during the same period by employees at the Beattyville facility who were engaged in the production of firemen's clothing; (2) involved substantially the same job skills as the production of firemen's clothing. Although the supervisory and managerial coordination required in meshing the various pieces of fire coats into the final product differed from the meshing of other products, that did not materially affect the employees' work. Also, (3) the history of products produced by Respondent demonstrated that other products were manufactured at Lake City before 1976. In 1976 and 1977 fire coats were the exclusive product produced at Lake City. However, as found above, unrebutted evidence demonstrated that Respondent was in the process of securing other facilities to manufacture fire coats. The evidence proved that Respondent would have moved its firemen's clothing line away from Lake City in the absence of union activity.

Therefore, I find nothing in the record which demonstrated that Lake City employees were not offered proper reinstatement following their unconditional offer to return to work.

CONCLUSIONS OF LAW

1. Respondent, Lion Uniform, Janesville Apparel Division, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. On July 14, 1977, the Union was and has been at all times since the exclusive bargaining representative of Respondent's employees in the bargaining unit described below within the meaning of Section 9(a) of the Act. The appropriate bargaining unit is:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Lake City, Tennessee plant, including the leadman and plant clerical employees, but excluding office clerical employees and professional employees, guards and supervisors as defined in the Act.

4. Respondent, by interrogating its employees concerning its employees' union activities; by threatening its employees that selection of the Union as a collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union in its plant, and that the Union could not solve the employees' problems; by threatening its employees with discharge if they joined or engaged in activities on behalf of the Union; by threatening its employees that Respondent would close its plant if the employees selected the Union as their collective-bargaining representative; by promising its employees employment for its employees and their relatives if the employees rejected the Union as their collective-bargaining representative; by soliciting its employees to influence other employees to vote against the Union; by threatening its employees that Respondent had canceled its plans for plant expansion and installation of air conditioning in its plant because of their membership in and activities on behalf of the Union; by threatening its employees that Respondent would withhold wage increases from its employees because of their activities on behalf of the Union; by promising its employees that Respondent would establish a grievance committee if its employees rejected the Union; and by threatening its employees with discharge because they engage in strike activity, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. Respondent, by unilaterally informing its employees that work rules would be more strictly enforced and that employees' privileges of having coffee and placing lunch orders through outside restaurants were being removed, at a time when the Union was collective-bargaining representative of the employees, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The strike among Respondent's bargaining unit employees, which commenced on or about October 12, 1977, was not caused or prolonged by Respondent's unfair labor practices.

7. Respondent did not otherwise engage in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act as alleged in the complaint.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, Lion Uniform, Janesville Apparel Division, Lake City, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing the employees in the exercise of their rights guaranteed to them in Section 7 of the Act in violation of Section 8(a)(1) of the Act by interrogating its employees concerning its employees' union activities; by threatening its employees that selection of the Union as a collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union in its plant, and that the Union could not solve the employees' problems; by threatening its employees with discharge if they joined or engaged in activities on behalf of the Union; by threatening its employees that Respondent would close its plant if the employees selected the Union as their collective-bargaining representative; by promising its employees employment for its employees and their relatives if the employees rejected the Union as their collective-bargaining representative; by soliciting its employees to influence other employees to vote against the Union; by threatening its employees that Respondent had canceled its plans for plant expansion and installation of air conditioning in its plant because of their membership in and activities on behalf on the Union; by threatening its employees that Respondent would withhold wage increases from its employees because of their activities on behalf of the Union; by promising its employees that Respondent would establish a grievance committee if its employees rejected the Union; and by threatening its employees with discharge because they engaged in strike activity.

(b) Unilaterally informing its employees that its work rules would be more strictly enforced and that the employees' privileges of having coffee and placing lunch orders through outside restaurants were being removed, without first negotiating with Oil, Chemical and Atomic Workers International Union, AFL-CIO, its employees' exclusive collective-bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, or to refrain from any and all such activities.

2. Take the following affirmative action designed and found necessary in order to effectuate the policies of the Act:

(a) Rescind its action of instituting more strict enforcement of work rules and removal of the employee privileges of having coffee and placing lunch orders through outside restaurants.

(b) Post at its facility in Beattyville, Kentucky, and mail to all bargaining unit employees[21] copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In view of evidence indicating that Respondent no longer maintains a facility in Lake City, Tennessee, but that some former employees of the Lake City facility are now employed at Respondent's Beattyville facility, I recommend the above Order in lieu of the normal recommendation which would have required Respondent to post the attached notice at its Lake City facility.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union membership, activities, and desires.

WE WILL NOT threaten our employees that selection of Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization, as their collective-bargaining representative would be futile by telling the employees that Respondent would not negotiate with the Union, that Respondent would never have a union in its plant, and that the Union could not solve the employees' problems.

WE WILL NOT threaten our employees with discharge if they join or engage in activities on behalf of the Union.

WE WILL NOT threaten our employees that we will close our plant if the employees select the Union as their collective-bargaining reprsentative.

WE WILL NOT promise our employees employment for themselves and their relatives if they reject the Union as their collective-bargaining representative.

WE WILL NOT solicit our employees to influence other employees to vote against the Union.

WE WILL NOT threaten our employees that Respondent has canceled its plans for plant expansion and installation of air conditioning at its plant because of their membership in and activities on behalf of the Union.

WE WILL NOT threaten our employees that we will withhold wage increases because of our employees' activities on behalf of the Union.

WE WILL NOT promise our employees that we will establish a grievance committee if the employees reject the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with discharge if they engage in strike activity.

WE WILL NOT unilaterally inform our employees that work rules will be more strictly enforced and that the employees' privileges of having coffee and placing lunch orders through outside restaurants are being removed.

WE WILL NOT in any like or related manner interfere with our employees' rights protected by Section 7 of the National Labor Relations Act.

WE WILL rescind our action in informing our employees that work rules will be more strictly enforced, and WE WILL reinstitute the employee privileges of having coffee and placing lunch orders through outside restaurants.

LION UNIFORM, JANESVILLE APPAREL DIVISION